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IN THE

Supreme Court of the United States

October Term, 1943.

No. 473

MAX KRAUSS, Trading as AMERICAN CORD AND WEBBING COMPANY,

Petitioner,

v.

BENJAMIN GREENBARG and JOSEPH GREENBARG, Trading as KING KARD OVERALL COMPANY.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

B. D. GLIENSER,
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Counsel for Petitioner.

TABLE OF CASES CITED IN PETITION.

STATUTE CITED IN PETITION.

TABLE OF CONTENTS OF BRIEF.

TABLE OF CONTENTS OF BRIEF (Continued).

TABLE OF CONTENTS OF BRIEF (Continued).

TABLE OF CASES CITED IN BRIEF.

TABLE OF CASES CITED IN BRIEF (Continued).

AUTHORITIES CITED IN BRIEF.

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BENJAMIN GREENBARG AND JOSEPH GREENBARG, TRADING AS KING KARD OVERALL COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Max Krauss, trading as American Cord and Webbing Company, respectfully represents:

1. That on March 11, 1941, he brought a civil action in the United States District Court for the Eastern District of Pennsylvania to recover from the respondents the sum of $15,326.13 for webbing sold and delivered to them in pursuance of a pencilled memorandum order (Exh. D. 5; R. p. 332a), which bears no date but was shown by the evidence to have been made on July 30, 1940 (ibid. pp. 52a-53a), and a formal acknowledgment by your petitioner (Exh. D. 6; ibid. p. 333a), dated July 31, 1940. Both papers specified that the deliveries of the ⅝ inch webbing, which were to commence within three weeks, were to be made at the rate of 50,000 yards weekly, and completed in eleven weeks.

2. That your petitioner's claim was undisputed but was met with a counter-claim for $22,740.99—there was an additional counter-claim for $11,599.82 pleaded in the respondents' Answer (ibid. p. 14a) which, however, was withdrawn at the trial (ibid. pp. 29a-30a) and thus dropped out of the case—as special damages sustained by the respondents, and allegedly caused by your petitioner's failure to make timely deliveries as stipulated.

3. That the facts relating to the said counter-claim and developed at the trial, were as follows:

The respondents had contracted to supply the Government (Exh. D. 3; ibid. pp. 301a-328a) with 698,084 pairs of canvas leggings, at the price of 61.99 cents per pair. The contract provided for deliveries in certain quantities on certain dates, and for a penalty—as liquidated damages—of two-fifths of one per cent of the price of each unit for each day's delay in the delivery thereof (ibid. p. 321a). It also provided in Article 17 (ibid. pp. 310a-312a) that the time for delivery was to be extended if the delay was due to unforeseeable causes beyond the contractor's or his subcontractor's control, and without his fault or negligence, and if written notice was given by the contractor within ten days thereof and the Government officer found the facts to be as stated.

At the time the contract for the webbing, which was to go into the manufacture of the leggings, was concluded by your petitioner with the respondents, the latter had not as yet received their Government contract, although they had been orally advised that their bid had just been accepted; and while the jury, by its special verdict, found that your petitioner knew that

the respondents would be subject to a penalty for delay, they also found that he did not know even approximately the amount thereof or the provision relating thereto (ibid. p. 367a).

There was no mention of any penalties either in the respondents' memorandum order for the webbing or in your petitioner's acknowledgment thereof; nor was there any evidence adduced to indicate that your petitioner knew that there would be no available market where the respondents might procure the necessary webbing in case of any default by your petitioner. Indeed there was no evidence even that, in point of fact, no such market existed.

The respondents admitted (ibid. p. 115a; p. 117a) that they took no steps to obtain an extension as provided in Article 17 of their Government contract, although it was shown that your petitioner's delay had been due to the fact that the weaving machines had broken down (ibid. p. 189a) and that that fact was known to the respondents (ibid. pp. 128a-129a; pp. 179a-180a).

4. That it was the respondents' contention that your petitioner's delay in delivering the webbing was the cause of their delayed deliveries to the Government and the resulting $22,740.99 penalties incurred by them. On the other hand, there was ample evidence adduced that other, independent, causes, in no way attributable to your petitioner, had intervened in effecting a part—if not all—of the respondents' delays, so that to that extent the respondents would have been delayed and the resulting penalties would have been incurred at all events even if your petitioner's deliveries had been made on time. Thus, it was shown that

the respondents had failed to make up all the webbing delivered by your petitioner into leggings and that on October 23, 1940, their default exceeded that of your petitioner by over 128,000 pairs (ibid. pp. 163a-171a); that after your petitioner had completed all the deliveries under his contract, on December 14, 1940 (Exh. D. 1; ibid. p. 300b), the respondents remained in default to the Government until February 18, 1941 (Exh. D. 12 facing p. 332a); that they did not have enough eyelets, and their shortage thereof, on November 17, 1940 involved 100,000 pairs of leggings (ibid. pp. 270a-271a); and that much of their delay was brought about by their landlord's distress for rent and their eviction (ibid. p. 278a), and by the removal of their factory (ibid. p. 300a)—all of which evidence so impressed the jury that they insisted upon apportioning the damages, and so repeatedly informed the trial Judge (ibid. p. 350a; p. 363a; pp. 368a-369a).

5. That the learned trial Judge did not permit them to do so but actually instructed them that, in order to hold your petitioner liable for all of the penalty incurred by the respondents, his default did not have to be the sole cause thereof; and that even if other, independent, causes concurred and were sufficient in themselves to prevent them from making some of their deliveries on time, unless those other causes were so serious that they alone would have caused all this penalty, your petitioner would still be liable therefor (ibid. p. 360a; p. 365a).

6. That the learned trial Judge also overruled your petitioner's motion to dismiss the respondents' counterclaim (ibid. p. 156a) and refused his point for binding instruction (ibid. pp. 353a-354a), which motions—your petitioner respectfully submits—should have been granted be-

cause, as pointed out on pp. 19-26 of the supporting brief handed up herewith, the said claim for special damages was unmaintainable as a matter of law by reason of the fact that the evidence did not disclose any basis for supposing that your petitioner had either assumed consciously liability for such damages or had warranted the respondents reasonably to suppose that he assumed such liability when his contract with them was entered into; and also by reason of the respondents' admitted failure to seek relief from the penalties under Article 17 of their contract with the Government.

7. That as a result of this ruling and the aforesaid instruction, the jury returned a verdict on January 21, 1942, in favor of the respondents for the full amount of their counter-claim.

8. That on January 27, 1942, your petitioner filed a motion for a new trial and a motion to set aside the verdict and for judgment in his favor. Both motions were overruled, after argument on August 7, 1942, in an Opinion (which is still unreported) by the trial Judge who directed a remittitur of $2000.00 to cover penalties for rejected leggings and the respondents' late deliveries subsequent to December 14, 1940—the date upon which all of your petitioner's deliveries had been completed (ibid. p. 409a); and the remittitur having been filed, judgment was entered on August 11, 1942, in favor of the respondents and against your petitioner in the sum of $5414.86 with interest from the date of the rendition of the verdict (ibid. p. 423a).

9. That on August 19, 1942, your petitioner appealed from the said judgment to the United States Circuit Court of Appeals for the Third Circuit; and that the said appeal resulted, on July 16, 1943, in an affirmation of the judgment

in an Opinion by Circuit Judge Goodrich. That Opinion is reported in 137 Fed. 2nd 569. Your petitioner thereupon filed in the said Circuit Court of Appeals, on July 31, 1943, a petition for a rehearing, which petition was refused by the said Court on September 20, 1943.

10. That this case involves the following three questions:

1. Was the said Circuit Court of Appeals right in holding as it did that the law of Pennsylvania (which, under Erie R. Co. v. Tompkins, 304 U. S. 64, is controlling) does not recognize the rule laid down by this Court in Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 544, and adhered to in England and generally throughout this Country, to the effect that recovery of special damages by a vendee against a defaulting vendor "depends (to quote the language of Mr. Justice Holmes, ibidem) on what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that he assumed, when the contract was made"; and that in this State to the contrary (quoting the language of the Circuit Court in the case at bar) the mere "knowledge of facts which makes the special damages foreseeable imposes liability therefor"?

2. Was the said Circuit Court of Appeals right in holding as it did that a delay caused by an accidental and unanticipated break-down of the weaving machinery does not come within the provisions of Article 17 of the respondents' contract with the Government; and that the respondents therefore could not have obtained relief thereunder?

3. Was the said Circuit Court of Appeals right in holding as it did that where, apart from the vendor's default, other, independent, causes which are in no way attributable to him made it impossible for his vendee to make a number of his deliveries on time the vendor is nevertheless liable for all the penalty incurred by the vendee as a result thereof?

11. That your Honorable Court has jurisdiction to review the said Judgment of the Circuit Court of Appeals under section 240 (a) of the Judicial Code as amended by the Act of Congress of February 13, 1925 (28 U. S. C., section 347); and that a writ of certiorari to bring about such a review ought to be granted for the following reasons:

1. As to the important question of the law of Pennsylvania relating to liability for special damages, the said decision of the Circuit Court of Appeals is—as more fully pointed out in your petitioner's accompanying brief—contrary to the applicable Pennsylvania decisions; and, if permitted to stand, would introduce an inter-jurisdictional conflict into the domain of commercial law where uniformity has always been regarded as essential and highly desirable.

2. The said decision of the Circuit Court of Appeals, construing and limiting the scope of Article 17 of the Government contract so as to exclude therefrom delays resulting from accidental and unanticipated machinery breakdowns—which Article in its present form is now a standard provision generally incorporated into practically all Government contracts of this character and thus affects the business world throughout the Country—involves an important question of

federal law which, your petitioner believes, has not been but should be settled by your Honorable Court.

3. The said decision of the Circuit Court of Appeals that where, apart from the vendor's default, other, independent, causes in no way attributable to him made it impossible for his vendee to make some of his deliveries on time, the vendor is nevertheless liable for all the penalty incurred by the vendee as a result thereof, is in conflict with the decision in Jefferson Hotel Co. v. Brumbaugh (C. C. A. 4th Circuit) 168 Fed. 867, and Caldwell & Drake v. Schmulbach, 175 Fed. 429, which followed it, and which was affirmed by the Circuit Court of Appeals of the 4th Circuit in Schmulbach v. Caldwell et al, 196 Fed. 16. Vide also Schmulbach v. Caldwell et al (C. C. A. 4th Circuit) 215 Fed. 70.

Wherefore your petitioner prays that a writ of certiorari issue to the said Circuit Court of Appeals for the Third Circuit to bring up this case for review by your Honorable Court.

And your petitioner will ever pray, etc.

MAX KRAUSS, trading as American
Cord & Webbing Company,
Petitioner.

UNITED STATES OF AMERICA,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, } *ss.:*

MAX KRAUSS, being duly sworn according to law, deposes and says that he is the petitioner in the foregoing petition, and that all the facts therein set forth are true.

MAX KRAUSS.

Sworn to and subscribed before me, this 28th day of October, 1943.

YETTA MARKOWITZ,
(Seal) *Notary Public.*
New York County Clerk's No. 488.
Bronx County Clerk's No. 27.
Commission expires Mch. 30, 1944.
(Certificate of County Clerk of Supreme Court, New York County attached.)